91-462

Supreme Court, U.S.
FILED
SEP 16 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991.

AUGUSTINE FERNANDEZ, Petitioner,

vs.

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent.

On a Petition for a Writ of Certiorari to the Court of Appeal, State of California, First Appellate District, Division Four.

PETITION FOR CERTIORARI

AUGUSTINE FERNANDEZ
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QUESTION PRESENTED

Did the Court err in allowing a rate of interest in excess of 7% authorized to National Banks, by 12 U.S.C. 85, "When no rate is fixed by the laws of the State"... of California .

PARTIES TO THE PROCEEDING BELOW

AUGUSTINE FERNANDEZ, and DICK LEBEL. Petitioner,

vs.

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991.

AUGUSTINE FERNANDEZ, Petitioner,

vs.

BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent.

On a Petition for a Writ of Certiorari to the Court of Appeal, State of California, First Appellate District, Division Four.

Petitioner, Augustine Fernandez, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeal, issued April 12, 1991.

OPINION BELOW

The Opinion of the Court of Appeal of

the State of California, First Appellate District, Division 4, entered and filed on April 12, 1991, is printed in Appendix "A" hereto and is not published in the Official Reports.

JURISDICTION

The Judgment and opinion, printed in Appendix "A", attached hereto, which Petitioner seeks to have reviewed, is is dated April 12, 1991, and was entered on April 12, 1991.

A rehearing by the Court of Appeal, First Appellate District, Division Four, was denied on May 2, 1991.

Review in the California Supreme Court was denied, In Bank, on June 19, 1991.

This Petition is filed within 90 days of that date, as required by 28 U.S.C. 2101(c); U.S. Sup. Ct. Rules, Rules 13.1, 13.2.

The Jurisdiction of this court is invoked under Title 28, Section 1257 (a) of the United States Code in that 12 U.S.C. 85, a Statute of the United States is drawn into question.

STATUTORY PROVISION INVOLVED

12 U.S.C 85 Rate of interest on loans, discounts, and purchases. Any association may, take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater,and no more, except that where by the laws of any

State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to

run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the county, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

STATEMENT OF CASE

Petitioner borrowed money on a Personal Loan from Respondent Bank of America, a National Bank, by Promissory Note. Arguments

arose and no payments were made.

Suit was brought in Superior Court of Contra Costa County, California. A default type Judgment was entered for principal, interest, attorney fees, and costs.

Petitioner appealed, raising the Federal question, that the interest awarded in the Judgment was in excess of the amount allowed by 12 U.S.C. 85, the Federal Statute which controls the rate of interest allowed to National Banks, "When no rate is fixed by the laws of the State ..... .

Defendant Dick Lebel did not appeal.

The Court of Appeal considered the issue and found that California has no rate of interest for banks fixed by the States laws. That 12 U.S.C. 85 has been construed by Hiatt v. San Francisco National Bank (9th Cir. 1966) 361 F.2d 504, cert. denied 385 U.S. 948 to mean that any interest rate is allowed because California has not fixed a rate.

The Court of Appeal Decision at page three, located in Appendix "A" erroneously held that Hiatt makes it clear that the highest federal court has addressed this issue; in that it cites Daggs v. Phoenix National Bank (1900) 177 U.S. 549, wherein the United States Supreme Court stated the following concerning the language of section 85:

> "'Fixed by the laws' must be construed to mean 'allowed by the laws,' not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of the national law is to adopt the state law, and permit to national banks what the state law allow to . . . the banks organized by it.' (Id. at p. 555 (emphasis added; original emphasis omitted).)

This is true as it related to States that have by statute fixed the rate of interest, as the state of Arizona had in Daggs; however, this Court continues on in Daggs, at the same page (p.555), as follows:

> "It is provided, however, that if no rate is fixed by such laws the bank may not charge a greater rate than 7 per cent,...

The Court of Appeal erroneously failed to note or consider the distinction by the proviso in 12 U.S.C. 85, acknowledged by the U.S. Supreme Court, in Daqqs.

The Court of Appeals reliance on Daqqs is misquided in that in Daqqs, there was a rate fixed by the Laws of the Territory 2161, Sec. 1, and 2162, Sec. 2, Statutes of Arizona, providing that, "parties may agree in writing for the payment of any rate of interest, whatever... . By this statute, there is "a rate fixed by the laws of the state", as it relates to 12 U.S.C. 85.

In our case there is, "No rate fixed by the laws of the state" of California.

Because the laws of Arizona had fixed a rate of interest for banks; while the laws of the California had not fixed the rate of

interest for banks, Daggs is distinguishable and not controlling to our case. It is erroneously relied upon by the Court of Appeal, causing conflict with the decisions of this Court.

REASONS FOR ALLOWANCE OF THE WRIT

Review by this Court is necessary on the ground that this case is one of first impression, with an important federal question of law and public policy as follows:

1. The Court of Appeals decision has decided an important question of federal law that has not, but should be settled by this Court, in that, contrary to 12 U.S.C. 85, National Banks in the state of California are allowed to charge rates of interest, uncontrolled by any legislative authority.

2. The Court of Appeals decision has decided a question of federal law (12 U.S.C. 85) in a way that is in conflict with

decisions of this Court, i.e., whether or not the U.S. Supreme Court in Daggs v. Phoenix National Bank has interpreted 12 U.S.C. 85, so that the Court of Appeals is bound by that interpretation, when in fact the legal facts of that case are distinguishable from this case. Daggs v. Phoenix National Bank, (1900) S. Ct. Rptr. Ed. 549, 177 US 882, 44 L. Ed. 882; Tiffany v. National Bank of Missouri (1874) S. Ct. (18 Wall.) 409, 85 US 862, 21 L. Ed. 862; Farmer' and Mechanic' National Bank v. Dearing, (1875) S. Ct. Rptr. Ed. 29, 91 US 196, 23 L.Ed. 196; Hazeltine v. Central National Bank, (1901) S. Ct. Rpts Ed 132, 183 US 118, 46 L. Ed 118.

The decision of the Court of Appeal is not in line with the U.S. Supreme Court, and allows National Banks to charge any rate of interest that they desire, unregulated by a legislative body, which is Usury, and contrary to 12 U.S.C. 85.

Under 12 U.S.C. 85, Congress has determined that there will be no unregulated rates of interest (Usury) charged by national banks. Either the State fixes the rate by State law or Congress has fixed the rate by 12 U.S.C. 85.

The U.S. Supreme Court has from the beginning construed 12 U.S.C. 85 to recognize a "system of regulation" controlling "Usury" and "interest", as shown by the following Supreme Court cases:

Hazeltine v Central National Bank, (1901) S. Ct. Rptr Ed. 132, 183 U.S. 118, 46 L. Ed. 118:

> "That part of the original National Bank Act which deals with the subject of Usury and interest is now embraced in Sec. 5197 and 5198 of the Revised Statute, (now 12 U.S.C 85), the first one (Sec. 5197) of which authorized National Banks to charge interest 'at the rate allowed by the laws of the State.' and when no rate is fixed by such laws, a maximum of 7 per pent." (Emp:)

Tiffany v. National Bank of Missouri, (1874) S Ct 18 Wall 409, 85 US 862, 21 L Ed 862, construed 12 U.S.C. 85 as follows:

> "If no rate of interest is defined by state laws, seven per cent is allowed to be charged." ..... Such, we think is the fair construction of the act of Congress, entirely consistent with its words and its spirit."

Farmer' and Mechanic' National Bank v. Dearing, (1875) S Ct Rpts Ed 29, 91 US 196, 23 L Ed 196, points out that no searching analysis is necessary to develop the true meaning of 12 U.S.C. 85, by finding:

> (3) Where no rate of interest is fixed by the laws of the state or territory, the national bank may charge at a rate not exceeding seven per cent per annun.
> .....
> "These clauses, examined by their own light, seems to us too clear to admit of doubts as to any thing to which they relate. They form a system of regulations. All the parts are in harmony with each other, and cover the entire subject."

The U.S. Supreme Court in Daggs v. Phoenix National Bank (1900) S. Ct. Rptr. Ed. 549, 177 US 882, 44 L Ed. 882, the case erroneously cited by the Court of Appeal, followed this system of regulation at page 555.

> "It is provided, however, that if no rate is fixed by such laws the bank may not charge a greater rate than 7 per cent,...

The above U.S. Supreme Court cases have not been overruled. They are still the law. They are not to be disregarded by the Court of Appeal.

Congress did not, under the guise of protecting Banks from State Legislative discrimination, intend to give Banks, (carte blanche), the right to charge any rate of interest that the bank may fix, without legislative regulation, as is contended here by the Respondent Bank, and found by the Court of Appeal.

12 U.S.C. 85 is plain and unambiguous. Its clear and explicit terms express the Congressional intention to have a reasonable and practicable plan to fix "Rate of interest on loans, discounts, and purchases", for National Banks, by a complete system of regulation of Rates, which prevents Usury, and prevents State Legislatures from discriminating against National Banks.

This Court has construed 12 U.S.C. 85, so that all parts are clear and in harmony with each other and cover the entire subject. by consistently holding that 12 U.S.C. 85, clearly shows a Congressional intent to restrict the rate of interest charged, "When no rate is fixed by the laws of the state".

Otherwise, this proviso would be construed to be meaningless and would allow unregulated rates of interest, i.e., Usury.

The Court should carry out the letter and spirit of 12 U.S.C. 85, by eliminating

the evil and mischief of unrestricted rates of interest, by National Banks, unregulated by Legislative authority, in harmony with the U.S. Supreme Court cases cited above.

This question require settlement by the Supreme Court to protect the public from unregulated rates of interest by National Banks in the State of California and to secure uniformity of decisions among the different Courts, by requiring the Court of Appeal to follow the precedents of the U.S. Supreme Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

DATED: September 12, 1991.

Augustine Fernandez

AUGUSTINE FERNANDEZ
Pro Se for Petitioner

APPENDIX "A"

Opinion of the California Court of Appeal, First District, Division 4, dated April 12, 1991, unpublished, affirming the decision of the Trial Court.

APPENDIX "A"

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE

OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

FILED
APR 12 1991
Court of Appeal
First App. Dist.
RON D. BARROW
Deputy

A049007

(Contra Costa Super.
Ct. No. 280085)

BANK OF AMERICA, NATIONAL TRUST
AND SAVINGS ASSOCIATION,

Plaintiff and Respondent,

v.

AUGUSTINE FERNANDEZ,

Defendant and Appellant.

In 1984 defendant Augustine Fernandez

borrowed $95,000 from plaintiff Bank of America. The promissory note evidencing the loan specified that interest on the principal would accrue at the rate of defendant's (sic) annual prime rate plus four percent. After defendant made no attempt to repay the loan, plaintiff filed a complaint to recover on the note for the principal, the interest accrued to date, and (pursuant to a provision in the note) reasonable attorneys' fees. Defendant having failed to appear on the date scheduled for trial, the trial court conducted what was to all intents and purposes a default hearing limited to the issue of plaintiff's damages. In accordance with its proof, plaintiff received judgment for the $95,000 principal, $78,136.20 interest, and attorneys' fees of $10,840.49. The note was cancelled at the court's order.

Having perfected a timely appeal from the judgment, defendant makes no challenge to

that portion of the judgment awarding plaintiff the principal of the loan. He does, however, attack the interest portion of the judgment, claiming that it is usurious.

The constitutional provision covering usury specifies that "none of (its) restrictions shall apply to any . . . loans made by . . . any bank created and operating under and pursuant to any laws of this State or of the United States of America . . ." (Cal. Const., art. XV, Sec. 1; accord Fin. Code, Sec. 1504.)

Defendant contends that plaintiff, as a federally-chartered bank, comes within this federal statute: "Any association may . . . charge . . . interest at the rate allowed by the laws of the State . . . where the bank is located, . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under state laws, the rate so limited shall be allowed for

associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, . . . the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum . . . ." (12 U.S.C. Sec. 85.) As defendant sees it, because California has not fixed a maximum rate of interest state-chartered banks may charge, plaintiff comes within the 7 percent ceiling declared by Congress.

Citing Hiatt v. San Francisco National Bank (9th Cir. 1966) 361 F.2d 504, cert. denied 385 U.S. 948, plaintiff responds that section 85 has been construed to mean that any interest rate is allowed because California has not fixed a rate. Hiatt does stand for this proposition. Hiatt would not, by itself, preclude us from reaching a different result, for "the decisions of the lower federal courts on federal questions are merely persuasive." (Rohr Aircraft Corp. v.

County of San Diego (1959) 51 Cal.2d 759, 764.) But Hiatt makes it clear that the highest federal court has also addressed this issue; it cites Daggs v. Phoenix National Bank (1900) 177 U.S. 549, wherein the United States Supreme Court stated the following holding concerning the language of section 85: " 'Fixed by the laws' must be construed to mean "allowed by the laws," not a rate expressed in the laws. In instances it might be that, but not necessarily. The intention of the national law is to adopt the state law, and permit to national banks what the state law allows to . . . the banks organized by it." (Id. at p. 555 (emphasis added; original emphasis omitted).) With this our discretionary powers vanishes, and we must yield to the principle that "we are bound by interpretations of federal statutes by the United States Supreme Court." (Rohr Aircraft Corp. v. County of San Diego, supra; accord

Filipino Accountants' Assn. v. State Bd. of Accountancy (1984) 155 Cal. App. 3d 1023, 1034.)

Plaintiff claims that this appeal is so totally without substance that it warrants the imposition of sanctions. The absence of California authority rejecting defendant's position furnishes the barest plausibility to defendant's appeal. Although plaintiff's request will therefore be denied, defendant should be aware that he came very close to having sanctions imposed on him. This denial is largely academic, given that--in accordance with the provision of the note--plaintiff is entitled to an additional award of attorneys' fees incurred on this appeal. The amount of that award is to be fixed by the trial court when it determines plaintiff's costs on appeal. (See Mitchell v. Exhibition Foods, Inc. (1986) 184 Cal. App.3d 1033, 1047-1049.)

The judgment is affirmed.

_____
Poche, J.

WE CONCUR:

_____
Anderson, P.J.

_____
Reardon, J.

APPENDIX "B"

Opinion of the California Court of Appeal, First District, Division 4, dated May 2, 1991, denying Petition for Rehearing, unpublished.

APPENDIX "B"

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION: 4

BANK OF AMERICA, NTSA

vs.

FERNANDEZ, AUGUSTINE
A049007

Contra Costa County No. 280085

FILED

May-2 1991
Court of Appeal
First App. Dist.
By RON D. BARROW
DEPUTY

BY THE COURT:

The petition for rehearing is denied.

Dated: May - 2 1991

ANDERSON, P.J.

APPENDIX "C"

Opinion of the California Supreme Court, dated June 19, 1991, denying Petition for Review, unpublished.

APPENDIX "C"

SUPREME COURT

FILED
JUN 19 1991

Robert Wandruff Clerk
Deputy

First Appellate District, Division Four,
No. A049007

S021015
IN THE SUPREME COURT OF THE STATE
OF CALIFORNIA

IN BANK

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSN., Respondent

v.

AUGUSTINE FERNANDEZ, Appellant

Appellant's petition for review DENIED.

Panelli, J. did not participate.

ARABIAN

Acting Chief Justice